(3) No. 95-724

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1995

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners file this Reply Brief in support of their Petition for a Writ of Certiorari solely to address the jurisdictional argument made in Respondent's Brief in Opposition. Respondent's argument that this Court lacks jurisdiction over this case even though the Petition for a Writ of Certiorari was filed within 90 days of the Court of Appeals' denial of a timely petition for rehearing rests on an erroneous statement of the law.

THE PROCEDURAL HISTORY

Petitioner-Plaintiffs' Complaint in this action stated two claims — the "standby claim" and the "exemption claim." The standby claim was that time spent on on-site back-up or night duty was work for which the Defendant-Respondent County of San Diego (hereinafter the "County") did not compensate Plaintiffs in accordance with the Fair Labor Standards Act (hereinafter the "FLSA"). Plaintiffs who worked for the County in the classifications of Assistant Deputy, Deputy, Senior and Supervisory Probation Officer; Nurse; and Park Ranger were party to the standby claim. The exemption claim was that the County had unlawfully treated all Plaintiffs working in classifications other than Assistant Deputy Probation Officer as exempt from the protection of the FLSA.

All Plaintiffs prevailed on all claims in the District Court. In its initial decision, the Court of Appeals affirmed the judgment in favor of the Assistant Deputy Probation Officers and the Nurses on the standby claim and reversed the judgment in favor of the Park Rangers on the standby claim as well as the judgment in favor of all non-Assistant Deputy Probation Officer Plaintiffs on the exemption claim.

After the initial decision by the Court of Appeals, timely petitions for rehearing were filed by one Plaintiff, a Park Ranger, and the County. The single Plaintiff Park Ranger's petition concerned his standby claims.[1] The County's petition concerned the

Assistant Deputy Probation Officers' and Nurses' standby claim. All non-Assistant Deputy Probation Officer Plaintiffs petitioned only for rehearing en banc on their exemption claim.

The Court of Appeals denied the single Plaintiff Park Ranger's petition for rehearing and the non-Assistant Deputy Probation Officer Plaintiffs' petition for rehearing *en banc*, but granted, in part, the County's petition for rehearing. The Court reversed its earlier decision upholding the application of a three year statute of limitations to the Assistant Deputy Probation Officers' standby-claim and the award of liquidated damages to these Officers. The Assistant Deputy Probation Officers, who are not Petitioners in this Court because they are not party to the exemption claim, then petitioned for rehearing. This petition was timely because it addressed that portion of the second Court of Appeals' decision that altered the original decision.[2] The Court of Appeals denied the petition.

The County concedes that the Petition for a Writ of Certiorari was filed within 90 days of the denial of the timely petition for rehearing.

ARGUMENT

Neither the fact that the second petition for rehearing did not raise the question stated in the Petition for a Writ of Certiorari nor the fact that it was the second petition for rehearing

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[1] Although it is not relevant to the question of jurisdiction, the County is therefore incorrect when it states that the first petition for rehearing concerned the issue currently before this Court. Opposition at 1.

[2] The petition for rehearing was also not redundant of an answer to the County's earlier petition because the Court of Appeals did not request an answer even though it granted the County's petition and no answer is permitted unless it is requested. *See* Fed.R.App.P. 40(a).

filed by Plaintiffs is relevant to the question of whether the Petition for a Writ of Certiorari was timely filed.

Supreme Court Rule 13.4 expressly addresses these points. The Rule states that the time for filing a petition "runs from the date the judgment or decree sought to be reviewed is rendered." However, the Rule then states, "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Thus the only question under Rule 13.4 is whether the petition for a writ of certiorari was filed within 90 days of the denial of a timely petition for rehearing. The Rule does not make tolling contingent on the petition raising the same question raised in the petition for a writ of certiorari and it does not limit the tolling effect to the first petition for rehearing that is timely filed.3

The County asks this Court to read Rule 13.4 as if it read: "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment *so long as the petition for a writ of certiorari states the same question raised in the timely petition for rehearing and the timely petition for rehearing is the first one filed in the case.*" This is not what the Rule says.

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[3] Given the liberal rules of joinder of both parties and claims in the District Courts, *see* Fed.R.Civ.P. 18, 20(a), the fact that Rule 13.4 explicitly states that a petition filed by "any party" in the Court of Appeals tolls the running of the time period for all parties, also strongly suggests that the petition need not raise the same question raised in the petition for a writ of certiorari in order to toll the running of the time for filing a petition for a writ of certiorari.

This Court has itself stated the tolling rule without reference to the content of the petition for rehearing or the number of such petitions filed. *In Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court stated, "Since *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942), it has been the consistent practice of the Court to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Id.* at 45.

The rationale underlying the unambiguous tolling rule also exposes the error in the County's argument. In *Jenkins*, this Court explained, "'[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.' . . . To put the matter another way, while the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Id.* at 46 (quoting *Pink*, 317 U.S. at 266). Thus in *Craig v. United States*, 298 U.S. 637 (1936), this Court dismissed a petition for a writ of certiorari on the grounds that it was premature because a petition for rehearing was pending in the Court of Appeals. In other words, if Petitioners had filed their Petition for a Writ of Certiorari at the time the County argues they should have filed, it would have been dismissed as premature. The filing of the second petition for rehearing "suspend[ed] the finality" of the new judgment — including its denial of the initial petition for rehearing. There was thus "no 'judgment' to be reviewed" — neither the first or second — until the second petition for rehearing was denied.

The principal reference work on Supreme Court practice confirms Petitioners' reading of the unambiguous language of Rule 13.4. According to Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993), the filing of a petition for rehearing in a court of appeals tolls the running of the period for filing a petition for a writ of certiorari in this Court for all parties "regardless

of whether the other parties would raise the same or different issues as raised in the petition for rehearing." *Id.* at 286.

Finally, the illogic of the County's position can be illustrated with a simple hypothetical. If the Court of Appeals' initial decision had reversed the District Court's extension of the statute of limitations and award of liquidated damages on the standby claim and the Assistant Deputy Probation Officer Plaintiffs had moved for rehearing on these issues, there could have been no dispute that the other Plaintiffs' time to file a petition for a writ of certiorari concerning any question would have been tolled under Rule 13.4. There is no conceivable reason why this should be true under these hypothetical facts, but not in this case where the Assistant Deputy Probation Officer Plaintiffs had no reason to petition for rehearing until after the second decision of the Court of Appeals.

The Petition was timely filed.

Respectfully submitted,

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